



PHILIPS

Philips Electronics

Thomas B. Patton
Vice President
Government Relations

July 20, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: In the Matter of Digital Output Protection Technology and Recording Method
Certifications: MB Docket Nos. 04-64 (Digital Transmission Content
Protection), 04-62 (Content Protection Recordable Media for Video Content)
and 04-61 (High Bandwidth Digital Content Protection).

Dear Ms. Dortch:

By this letter, Philips Electronics North America Corporation ("Philips") requests that the Federal Communications Commission (the "Commission") take notice of the July 13, 2004 decision of the Japan Fair Trade Commission ("JFTC"), concluding that a Non-Assert provision in licenses with manufacturers constituted an unfair trade practice in violation of Japan's Antimonopoly Act. Taken together with the antitrust concern about such Non-Assert provisions evidenced in the Microsoft antitrust case in the United States, discussed in detail in Philips' July 2, 2004 written *ex parte* letter to the Commission,¹ and for the additional reasons set forth in numerous filings in these proceedings,² it would be error as a matter of law and policy were the Commission to conclude that similar Non-Assert provisions in the DTCP, CPRM, and HDCP licenses could survive under the reasonable and non-discriminatory licensing mandate adopted by the Commission.

¹ See Letter of Thomas B. Patton, Philips, to Chairman Michael K. Powell dated July 2, 2004, MB Docket Nos. 04-61, 04-62 and 04-64 ("*Philips July 2, 2004 Letter*") at 7-9.

² See Oppositions of the American Antitrust Institute ("AAI") in MB Docket Nos. 04-61 (at 6-7) 04-62 (at 8-9) and 04-64 (at 8-9); Opposition of Hewlett-Packard Company ("HP") in MB Docket 04-64 at 3-4; and Oppositions of Philips in MB Docket Nos. 04-64 (at 15-21), 04-61 (at 12-17), 04-62 (at 15-21). See also, *In the Matter of Digital Broadcast Content Protection*, Further Notice of Proposed Rulemaking (MB Docket No. 02-230), Comments of AAI (at 12-14), Comments of Philips (at 24); and Reply Comments of Philips (at 21).

The translation of the JFTC's decision concluding that the Non-Assert provisions in Microsoft's licenses with Japanese personal computer manufacturers constituted an unfair trade practice in violation of Japan's Antimonopoly Act is attached hereto as Appendix 1.³ The facts are startlingly similar to the concerns Philips, Hewlett-Packard, and public interest groups have raised regarding the DTCP, CPRM, and HDCP licenses. The Non-Asserts, in all instances, are broad, requiring the relinquishment by licensees of rights to enforce their patents that may be infringed by the patents/intellectual property that are the subject of the Non-Assert provisions, thereby impeding competition and innovation. Just as in the case of the dominance of Microsoft's Windows OS, there is no competition to DTCP, CPRM, and HDCP at this time in the unique spaces they occupy respectively in digital broadcast content protection. The JFTC's conclusion about the Non-Assert provision was clear and unequivocal:

Such conduct by Microsoft shall be construed as dealing with PC manufacturers on conditions which unjustly restrict their business activities, which the JFTC concluded correspond to the Subsection 13 of the Unfair Trade Practices, violating the Section 19 of the Antimonopoly Act.⁴

Notwithstanding that Microsoft already had discontinued use of the Non-Assert provisions in new contracts as of February 2004, as it has done in the United States, the JFTC determined that was insufficient to rectify the anticompetitive problem. Therefore, it recommended that Microsoft terminate the Non-Assert provisions in current and past licenses as well.⁵

As discussed in detail in Philips' July 2, 2004 letter to the Commission, the use of Non-Assert provisions in Microsoft's licenses also has been raised in the Microsoft antitrust case in the United States. Appendix 2 to this letter is the text of a July 9, 2004 Joint Status Report to the court addressing the Non-Assert provisions.⁶ Microsoft has ceased using the

³ See "The JFTC Renders A Recommendation To Microsoft Corporation" (July 13, 2004), Japanese Fair Trade Commission (English translation) ("*JFTC Decision*"), also available at: <http://www2.jftc.go.jp/e-page/press/2004/july/040713.pdf>. The Japanese version is available at: <http://www2.jftc.go.jp/pressrelease/16index.htm>.

⁴ *JFTC Decision* at 4.

⁵ See *JFTC Decision* at 1, 4-5.

⁶ *Joint Status Report on Microsoft's Compliance with the Final Judgments*, Civil Action No. 98-1232 (CKK), United States District Court for the District of Columbia, July 9, 2004 ("*Joint Status Report on Microsoft Compliance*"), also available at: <http://www.usdoj.gov/atr/cases/f204500/204560.pdf>.

Non-Assert provisions prospectively,⁷ and there continue to be complaints about the survival of Non-Asserts in previous contracts.⁸

In light of the JFTC decision and the status of the Non-Assert provisions in the Microsoft antitrust case in the United States, it should be extremely difficult for the FCC to conclude that the Non-Assert provisions have any place in licenses for FCC approved digital content protection technologies.

In these proceedings, Philips only asks that the the FCC conclude that the Non-Assert provisions in the DTCP, CPRM, and HDCP licenses are incompatible with “reasonable and non-discriminatory” licensing required by the Commission’s Broadcast Flag Order and that any Commission approval of these digital content protection technologies be conditioned on changes to the Non-Assert provisions to allow for a RAND option, at the election of the licensee.

The DTCP, CPRM, and HDCP licensors’ primary justification for the Non-Assert provisions is that they permit “lower than typical commercial royalty rates,”⁹ thus contributing to lower costs of digital products.¹⁰ There are three striking flaws in this argument.

First, the licensors provide not one shred of quantitative data to support their assertion that the Non-Assert provisions in fact result in lower licensing fees. As noted in the Philips July 2 letter, the only empirical data in the record on this point, the comparison of CPRM and Vidi licensing fees, contradicts the DTCP, CPRM and HDCP licensors’ assertion.¹¹

⁷ See *Joint Status Report on Microsoft Compliance* at 6-7.

⁸ *Id.*

⁹ Reply of the Digital Transmission Licensing Administrator in MB Docket No. 04-64 (“DTLA Reply”) at 19.

¹⁰ See *Ex Parte* presentation of the Digital Transmission Licensing Administrator, MB Docket No. 04-64, June 29, 2004, at 21.

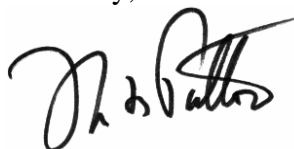
¹¹ See *Philips July 2, 2004 Letter* at n.15. Were the Commission to rest a decision leaving in place the Non-Assert provisions absent any data to support it, it is difficult to imagine such a decision surviving judicial review. See 5 U.S.C. § 706(2)(E) (“The reviewing court shall...hold unlawful and set aside agency action, findings, and conclusions found to be...unsupported by substantial evidence....”); see, e.g., *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002); *Prometheus Radio Project v. FCC*, 2004 U.S. App. LEXIS 12720 (3rd Cir. 2004); *United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002).

Second, insistence on the Non-Assert provisions could well lead to significantly higher licensing costs than a reciprocal RAND obligation. The Non-Asserts could trigger a company with a blocking patent to refuse to sign the license and charge high royalties to compensate for its inability to sell products or alternatively, to sell the patent to a non-manufacturer that would not have to sign the license and could charge licensing fees far higher than those that would be permissible under a reciprocal RAND licensing obligation. Thus, licensors' argument regarding low cost licensing is not supported by any evidence in the record, much less substantial evidence, and is speculative.

Third, and directly implicated by the JFTC decision and the DoJ scrutiny of the Microsoft Non-Assert provisions, even if conduct may result in lower costs in the near term, producing transitory consumer benefits, it may still be impermissible because it is anticompetitive. Moreover, even if lower licensing costs might result in the short-term from the Non-Asserts, that result is only achieved by a dominant licensor forcing licensees to surrender their patent rights. Certainly, the Commission should not be sanctioning such conduct in this proceeding where the objective was to preserve intellectual property rights, not destroy them. The long-term effect of such clauses will be to reduce competition, impede innovation and ultimately lead to higher licensing costs and higher digital product costs to consumers.

The reasonable and nondiscriminatory licensing requirement is a principal means by which the Commission can ensure that no industry segment will exercise undue control over the selection or implementation of digital content protection technologies. The JFTC decision and the continuing focus on Non-Assert clauses by the DoJ in the Microsoft case are flashing red lights for the Commission that Non-Assert provisions have no place in licenses for FCC approved digital content protection technologies. The Commission should not and must not ignore them.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. B. Patton', with a stylized, cursive script.

Thomas B. Patton

Vice President, Government Relations

Appendix 1: "The JFTC Renders A Recommendation To Microsoft Corporation" (July 13, 2004)

Appendix 2: *Joint Status Report on Microsoft's Compliance with the Final Judgments*, Civil Action No. 98-1232 (CKK), United States District Court for the District of Columbia (July 9, 2004).

Ms. Marlene H. Dortch

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cc: FCC Chairman Michael K. Powell
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FCC Commissioner Michael J. Copps
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